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Supreme Court of the United States

OCTOBER TERM, 1963

No. 580

VICTOR H. SCHIRO, INDIVIDUALLY AND AS MAYOR OF THE CITY OF NEW ORLEANS, ET ALS.,
Appellants,

versus

HORACE C. BYNUM, ET ALS.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

STATEMENT AS TO JURISDICTION.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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No.

VICTOR H. SCHIRO, INDIVIDUALLY AND AS MAYOR OF THE CITY OF NEW ORLEANS, ET ALS.,
Appellants,

versus

HORACE C. BYNUM, ET ALS.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

STATEMENT AS TO JURISDICTION.

Appellants, Victor H. Schiro, Mayor of the City of New Orleans; Wiltz W. Wagner, Managing Director, Municipal Auditorium of New Orleans; and, Joseph Giarrusso, Superintendent of Police of the City of New Orleans, appeal from a judgment of the United States District Court for the Eastern District of Louisiana, entered on August 5th, 1963, declaring unconstitutional Louisiana Statutes Annotated Revised Statutes Sections 4:452, 4:453, and, 4:454, and enjoining the appellants, and all persons who are acting or may act in concert with them, from enforcing the said provisions of the Revised Statutes of Louisiana. Appellants submit this statement to show that the Supreme Court of the United States has jurisdic-

tion of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the Eastern District of Louisiana issued on July 1st, 1963, and the judgment and preliminary injunction issued on August 5th, 1963. This opinion and preliminary injunction are unreported. A copy of the opinion and preliminary injunction complained of are attached hereto in Appendix "A".

JURISDICTION

This appeal is as to the judgment of the United States District Court for the Eastern District of Louisiana, specially constituted under 28 U.S.C. Sec. 2281 and 28 U.S.C. Sec. 2284 upon the complaint of Horace C. Bynum, and others, seeking an interlocutory and permanent injunction to have declared unconstitutional Sections 4:452, 4:453, and 4:454 of the Revised Statutes of the State of Louisiana of 1950, as amended, and to enjoin and restrain the Mayor of the City of New Orleans, the Managing Director of the Municipal Auditorium of New Orleans, and, the Superintendent of Police of the City of New Orleans from enforcing these Sections of the Revised Statutes of Louisiana, as same are repugnant to the privileges and immunities of citizens of the United States, due process of law and the equal protection of the Laws Clauses of the Fourteenth Amendment of the United States Constitution and the rights and privileges secured by Sections 1981 and 1983 of Title 42, United States Code; and, further, enjoining and restraining the appellants from denying to the New Orleans Branch of the National Association for the Advancement of Colored People the use of the Municipal Auditorium of New Or-

leans in the same manner and under the same terms and conditions as any other organization, group or corporation.

The decree appealed from was made and entered on August 5th, 1963. Notice of Appeal was filed in the United States District Court for the Eastern District of Louisiana on August 29th, 1963.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of by the provisions of 28 U.S.C. §§ 1253 and 2101(b).

The following decisions are submitted as sustaining the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Palmetto Fire Insurance Company vs. Conn.*, 272 U.S. 295, 47 S. Ct. 88, 71 L. Ed. 243; *St. John vs. Wisconsin Employment Relations Board*, 340 U.S. 411, 71 S. Ct. 375, 95 L. Ed. 386.

In the Opinion of the District Court, see p. 25 of Appendix "A" attached, there was a question in the Court's mind as to whether this matter should have been tried by the District Court sitting as a three judge court or whether it should have been heard by the District Judge to whom the matter was allotted. It is true that in the matter of *Dorsey vs. State Athletic Commission*, D.C., 1959, 168 F. Supp. 149, affirmed 359 U.S. 533, 79 S. Ct. 1137, 3 L. Ed. 2d 1028, rehearing denied 360 U.S. 940, 79 S. Ct. 1446, 3 L. Ed. 2d 1552, this Court had occasion to pass upon the Section of the Revised Statutes of Louisiana of 1950 designated as L.S.A.-R.S. 4:451. This Section of the Revised Statutes of Louisiana of 1950 was enacted into law as Section 1 of Act 579 of the Regular Session of 1956 of the Louisiana Legislature. This Section 1 prohibited "participants or contestants" being of

the white and negro races in certain entertainments and athletic contests. This litigation involves Sections 2, 3, and 4 of Act 579 of the Regular Session of 1956 of the Louisiana Legislature. These provisions are carried over into the Revised Statutes of Louisiana of 1950 designated as L.S.A.-R.S. 4:452, 4:453 and 4:454.

In Section 1 of the Act 579, sponsors or persons in control of premises were prohibited from permitting on premises under their control social functions or athletic contests where the participants or contestants are members of the white and negro races. In Sections 2, 3, and 4 of Act 579 sponsors or persons in control of premises where any entertainment or athletic contest are held and where the public is invited must provide separate seating arrangements and separate sanitary facilities. In Section 1 of the Act 579 the social function or athletic contests where the participants or contestants are members of the white and negro races is prohibited and no person may permit premises under his control from being used in such a way. In Sections 2, 3, and 4 of the Act 579 the members of the white and negro races are not prohibited from being spectators at entertainments or athletic contests, where the public is invited or may attend, but only that they must be separately seated and they must use separate sanitary facilities.

It is submitted that the doctrine of *Bailey vs. Patterson*, 369 U.S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512, is not applicable in the instant matter. This Court in *Bailey* in interpreting the provisions of 28 U.S.C. 2281 established that where "prior decisions made frivolous any claim that a state statute on its face is not unconstitutional" a three judge District Court is not required. The statutes before the Court in *Bailey* were Mississippi laws as to segregation of the races in transportation facilities

in inter-state or intra-state flow of commerce. These Mississippi statutes were apparently no longer a litigable issue because of the holding of this Court in *Morgan vs. Commonwealth of Virginia*, 328 U.S. 373, *Gayle vs. Browder*, 352 U.S. 903, and, *Boynton vs. Virginia*, 364 U.S. 454. But the Louisiana Statute presently before this Court, that is, Sections 2, 3 and 4 of Act 579 of the Regular Session of 1956 have not been passed upon by this Court or the other Courts of the United States nor has a similar statute of another State been finally passed upon by this Court or the other Courts of the United States.

This Court has jurisdiction to review the judgment below on direct appeal.

STATUTES INVOLVED

The Statutes involved in this proceeding are Sections 4:452, 4:453, and 4:454 of the Revised Statutes of Louisiana of 1950, which provisions of the Statutes were enacted into law by Act No. 579 of the Regular Session of the Louisiana Legislature of 1956 and are carried at pages 1054 and 1055 of the Acts State of Louisiana, Regular Session 1956. These provisions of the Statutes provide as follows:

> 4:452—Separate seating and facilities.
>
> At any entertainment or athletic contests, where the public is invited or may attend, the sponsors or those in control of the premises shall provide separate seating arrangements, and separate sanitary, drinking water and any other facilities for members of the white and negro races, and to mark such separate accommodations and facilities with signs printed in bold letters. Acts 1956, No. 579, § 2.

4:453—Races prohibited from using the others seating and facilities.

White persons are prohibited from sitting in or using any part of seating arrangements and sanitary or other facilities set apart for members of the negro race; and members of the negro race are prohibited from sitting in or using any part of seating arrangements and sanitary or other facilities set apart for white persons. Acts 1956, No. 579, § 3.

4:454—Penalty.

Any person, firm or corporation violating the provisions of this chapter shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than $100.00 or more than $1,000.00 and imprisoned for not less than 60 days nor more than 1 year. Acts 1956, No. 579, § 4.

QUESTIONS PRESENTED

The principal question presented is whether the provisions of the Revised Statutes of Louisiana of 1950, R.S. 4:452, 4:453 and 4:454, providing the segregation of the races at any entertainment or athletic contest as to seating arrangements, and separate sanitary, drinking water and any other facilities, are unconstitutional on their face or are these provisions valid and pursuant to the police powers of the State of Louisiana.

The answer to this question necessarily would determine the second question presented and that is the validity of the injunction rendered prohibiting the appellants from enforcing these statutes.

STATEMENT OF THE CASE

This is an action by various complainants, individually, and as officers of the New Orleans Branch of the National Association for the Advancement of Colored

People, and the New Orleans Branch of the National Association for the Advancement of Colored People, for a declaratory judgment and for an injunction declaring L.S.A.-R.S. 4:452, 4:453 and 4:454 unconstitutional and to enjoin the defendants from enforcing these provisions of the Revised Statutes of the State of Louisiana of 1950. The complainants also sought an injunction prohibiting the various defendants from denying to the New Orleans Branch of the N.A.A.C.P., the use of the Municipal Auditorium in New Orleans on the same terms and conditions as any other organization, group or corporation.

The complainants sometime in the early part of 1962 made application for the use of the Municipal Auditorium in New Orleans, which building is owned and operated by the City of New Orleans, for a program to be open to all members of the public on October 14, 1962. The use of the building for such an open meeting was denied and this declaratory judgment action ensued.

THE QUESTIONS ARE SUBSTANTIAL

The principle question in this matter is whether the State of Louisiana through its Legislature has the power under its police powers to prohibit any entertainment or athletic contest open to the public to be held unless in compliance with certain requirements as to the separate seating arrangement for white and negro persons and for separate facilities for the two races.

The Legislature by the terms of the Statutes herein in controversy has not proscribed meetings of any nature being held between members of the negro and white races. First of all, as to private meetings, that is, those not open to the public, the terms of the Statutes do not apply. Secondly, as to meetings open to the public, only those are regulated that are entertainments or athletic contests.

Specifically excluded from the terms of the Statutes are religious gathering, services or functions. See Section 5 of Act 579 of the Regular Session of the Louisiana Legislature of 1956. Squarely at issue is the right of the Legislature of Louisiana to place certain regulations on those persons holding an entertainment or athletic contest to which the public is invited or may attend.

It cannot be denied that the State of Louisiana can make reasonable requirements regulating the manner in which these public meetings may be conducted. For example, the numbers attending may not exceed the capacity of the building so as to create a fire hazard. *Barbier vs. Connolly*, 113 U.S. 27, 31, 5 S. Ct. 357, 28 L. Ed. 923. Likewise the State could prevent an imminent public commotion, even though caused by peaceful and orderly conduct. *Cantell vs. State of Conn.*, 310 U.S. 296, 308, 60 S. Ct. 900, 905, 84 Lawyers Ed. 1213.

Here the Louisiana Legislature has recognized that at athletic contests the spectators may become aroused by their support of one of the contesting teams, so that, carried away, there may be disturbances of the peace. The possibility of this disturbance being far more harmful would be when that, which, under other circumstances, would be only a dispute between spectators, would be converted into an altercation between the races and a race riot.

The Louisiana Legislature must be empowered to so regulate public gatherings that the peace and tranquility of the State will not be disturbed. Where the fact of the presence of negro and white spectators at an athletic contest raises the danger of a disturbance of the peace the State must be permitted to act. It is submitted that such a law has for one of its purposes the prevention of a

dangerous conflict between the races. That it segregates the races is only the incidental effect of this law. The State must be empowered to preserve the life and prevent the bodily injury of the citizens of the State.

It is submitted that these statutes are valid under the police powers of the Legislature of the State of Louisiana and, that, necessarily the injunction of the District Court enjoining their enforcement improvidently issued.

Respectfully submitted,

ALVIN J. LISKA,
City Attorney,

ERNEST L. SALATICH,
Assistant City Attorney,
Attorneys for the Appellants,
Room 2W23—City Hall,
New Orleans, Louisiana.

CERTIFICATE

I, Alvin J. Liska, City Attorney for the City of New Orleans and a member of the Supreme Court of the United States, do hereby certify that on this date, I served copies hereof, on all parties in this cause, by mailing a copy in a duly addressed envelope, with postage paid, to counsel of record for said parties.

This ..... day of October, 1963.

ALVIN J. LISKA

APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 12439 Division D.
Civil Action

HORACE C. BYNUM ET ALS
VS
VICTOR H. SCHIRO, Individually and as Mayor of the City of New Orleans, et al

ORDER FOR PRELIMINARY INJUNCTION

For the written reasons of the Court filed herein on July 1, 1963, IT IS ORDERED that Victor H. Schiro, individually and as Mayor of the City of New Orleans; Wiltz W. Wagner, individually and as Managing Director, Municipal Auditorium of New Orleans; and Joseph Giarrusso, individually and as Superintendent of Police of the City of New Orleans, defendants, their officers, agents, servants, employees and attorneys, and their successors in office, and those in concert with them who shall receive notice of this order, be, and they are, hereby restrained and enjoined from enforcing and applying the provisions of LSA-R.S. 4:452, 4:453, and 4:454 of the State of Louisiana, and any and all customs, practices and usages pursuant to which plaintiffs and all other negro citizens of the City of New Orleans are compelled to occupy segregated sections and/or segregated seats, use segregated sanitary facilities at public functions; and from denying to the New Orleans Branch of the National Association

for the Advancement of Colored People the use of the Municipal Auditorium of New Orleans in the same manner and under the same terms and conditions as any other organization, group or corporation; pending a final determination of this cause.

The preliminary injunction shall become effective upon the furnishing by plaintiffs of a bond in the sum of $500.00 conditioned as provided by law.

New Orleans, Louisiana, August 5, 1963.

(s) JOHN MINOR WISDOM
United States District Judge

(signed) ROBERT A. AINSWORTH, JR.
United States District Judge

(signed) FRANK B. ELLIS
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION
NO. 12439

HORACE C. BYNUM,
EDWIN J. BARTHE,
ANDERSON V. WASHINGTON, JR.,
ARTHUR J. CHAPITAL, SR.,
HENRY N. HAYES,
EDWARD J. GROOMS,
MILTON J. SIMON,
LLEWELYN J. SONIAT,
REV. AVERY C. ALEXANDER, and
REV. MILTON L. UPTON,

INDIVIDUALLY and as officers of the NEW ORLEANS BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and the NEW ORLEANS BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs,

vs.

VICTOR H. SCHIRO, Individually and as Mayor of the City of New Orleans;
JAMES E. FITZMORRIS, JR.,
JOSEPH V. DiROSA,
HENRY B. CURTIS,
WALTER F. MARCUS,
CLARENCE O. DUPUY,
JOHN J. PETRE,
DANIEL L. KELLY,

Individually and as Councilmen of the City of New Orleans;

WILTZ W. WAGNER, Individually and as Managing Director, Municipal Auditorium of New Orleans;

JOSEPH GIARRUSSO, Individually and as Superintendent of Police of the City of New Orleans,

Defendants.

Present:

Attorneys for Plaintiffs:

Ernest N. Morial, A. P. Tureaud,
A. M. Trudeau, Jr., Robert L. Carter.

Attorneys for Defendants:

Alvin J. Liska, Ernest L. Salatich,
Jack P. Gremillion, Wm. P. Schuler.

Before WISDOM, Circuit Judge, and AINSWORTH and ELLIS, District Judges.

WISDOM, Circuit Judge:

In this class action the plaintiffs, New Orleans Negroes, ask the City of New Orleans for equal treatment of Negroes at the Municipal Auditorium. They complain on two counts. (1) As individuals for themselves and for all Negroes similarly situated, they complain that at all public functions held in the Auditorium, the City requires the audience to be segregated by race. (2) As officers of the New Orleans Chapter of the National Association for the Advancement of Colored People, the plaintiffs complain that the City discriminates against the NAACP and similar organizations by denying the use of the Auditorium to organizations advocating desegregation.

Cities may as well face up to the facts of life: New Orleans, here and now, must adjust to the reality of having to operate desegregated public facilities. Time has run out. There is no defense left. There is no excuse left—no excuse which a court, bound by respect for the Rule of Law, could now legitimize as a legal justification for a city's continued segregation of governmental facilities. There is left not even that last ditch, token desegregation: gradual desegregation in the name of "deliberate speed" has no application to a municipal auditorium or to other publicly owned or operated facilities presenting none of the administrative problems inherent in remaking a public school system.

We find for the plaintiffs and grant their prayer for a preliminary injunction.

I.

A. There is no substantial dispute over the facts as they relate to the City's policy and practice of separating the races in the Auditorium. Counsel for the plaintiffs

called as witnesses Mr. Wiltz Wagner, Managing Director of the Auditorium, and his chief clerk, Mrs. Melda Boyd, who has been with the Auditorium thirty-four years. They testified that as a matter of policy the City requires segregated seating at all "open" meetings held in the Auditorium. An "open" meeting, they explained, is one open to the public or one for which tickets are sold without restriction. A concert of the New Orleans Symphony is an example of an "open" meeting. The Auditorium does not prescribe segregation at religious meetings[1] and "closed" meetings.

Mr. Horace C. Bynum, one of the plaintiffs, a member of the NAACP for twenty years and a Vice-President of the New Orleans Branch in 1962, testified that he applied to the Auditorium for its use for a "kick-off" meeting in a campaign to increase the membership of the local NAACP. Mr. Wagner told him that the application had to be refused because the NAACP advocated desegregation. Mr. Bynum testified that the NAACP in New Orleans had never urged the violation of a city or state law and that its policy was to seek redress through the courts. He said that he had attended a prize fight at the Auditorium where he was required to sit in a seat in a segregated section reserved for Negroes only. He assumed, based on the segregated audience, although he did not leave his seat during the fight, that there were separate washrooms and drinking fountains for Negroes. The record is otherwise silent as to segregation of these facilities. Mr. Anderson V. Washington, another plaintiff, corroborated Mr. Bynum's testimony as to the NAACP's request for the Auditorium and the reason for its rejection.

The regular form lease the Auditorium uses contains the following provision:

> "This agreement is made and entered into upon the following express covenants and conditions, all and every one of which the lessee hereby covenants and agrees to and with the lessor to keep and perform.
>
> "1. That said lessee will comply with all laws of the United States, and of the State of Louisiana, all ordinances of the City of New Orleans, and all rules and requirements of the police and fire departments, or other municipal authority of the City of New Orleans, and will obtain and pay for all necessary permits and licenses, and will not do, nor suffer to be done, anything on said premises during the term of this lease in violation of any such laws, ordinances, rules or requirements, and if the attention of said lessee is called to any such violation on the part of said lessee, or of any person employed by or admitted to the said premises by said lessee, such lessee will immediately desist from and correct such violation."

The effect of this provision is to require the licensee to agree to comply with the Louisiana Anti-Mixing Statute of 1956, LSA-R.S. 4:452-455.[2] LSA-R.S. 4:452 requires the sponsors or persons in control of premises where "entertainment or athletic contests" are held to provide separate seating arrangements and separate facilities for members of the white and Negro races.[3] LSA-R.S. 4:453 prohibits whites and Negroes from sitting in or using any part of seating arrangements and sanitary or other facilities set apart for members of either race. LSA-R.S. 4:454 provides the penalty for the violation of LSA-R.S. 4:452 and 4:453.

On the facts, the City, with commendable honesty, offered no countervailing evidence of its policy and practice of enforcing segregation at the Auditorium. On the law, the City closed its eyes to overwhelming high legal

authority, stood up for its Auditorium policy, and defended the constitutionality of anti-mixing laws as a proper exercise of the police power.

B. "[I]t is no longer open to question that a State [or City] may not constitutionally require segregation of public facilities." *Johnson v. Virginia*, 1963, 373 U.S. 61, ... S. Ct. ....., ... L. Ed. 2d ..... In that case the Court held that a city may not segregate seating in courtrooms. In other cases courts have held that public parks and playgrounds (*Watson v. City of Memphis*, 1963, 373 U.S. ....., ... S. Ct. ....., ... L. Ed. 2d .....), public beaches and bathhouses (*Dawson v. Mayor and City Council of Baltimore*, 4 Cir. 1955, 200 F. 2d 386, *aff'd* per curiam 1935, 350 U.S. 877, 76 S. Ct. 133, 100 L. Ed. 774), golf courses (*New Orleans City Park Improvement Ass'n. v. Detiege*, 5 Cir. 1958, 252 F. 2d 122, aff'd per curiam, 358 U.S. 54, 79 S. Ct. 99, 3 L. Ed. 2d 46), and restaurants in public buildings (*Burton v. Wilmington Parking Authority*, 1961, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45) may not be segregated.

In view of these decisions and numerous others which might be cited, we hold that the 1956 Louisiana Anti-Mixing Law, LSA-R.S. 4:451, 452, 453, 454, 455, is unconstitutional. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 1943, 320 U.S. 81, 100, 63 S. Ct. 1375, 1385, 87 L. Ed. 1774, 1786. "Racial classifications are obviously irrelevant and invidious." *Goss v. Board of Education*, 1963, ... U.S. ....., ... S. Ct. ....., ... L. Ed. 2d ..... The humiliation of being restricted to a certain area in the Auditorium is sufficient harm to give the plaintiffs standing to sue. *Brown v. Board of Education*, 1954, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873.

The able counsel for the State argues persuasively that the constitutionality of the statute is not at issue, since a kick-off meeting for a membership campaign is neither an "entertainment" nor an "athletic contest" and therefore does not come within the coverage of the statute. This argument would be more effective if the plaintiffs objected only to the City's refusal of the Auditorium to the NAACP and if the basis for the City's denial of the application were only the statute. But the complaint objects to segregation generally at the Auditorium. The evidence shows that all open meetings, including entertainments and athletic contests, were segregated. Bynum testified that he was required to sit in a segregated section at a prize fight in the Auditorium. The City asserted the statute as a defense. In view of these circumstances, the constitutionality of the statute is at issue. To the extent that the City relied on the law, the City relied on a law unconstitutional on its face.

C. The City's segregation policy, enforced and carried out at the Auditorium, amounts to city action to the same extent as if it were a city ordinance. "A state, or a city, may act as authoritatively through its executive as through its legislative body." *Lombard v. Louisiana*, ..., 373 U.S. ....., ... S. Ct. ....., ... L. Ed. 2d .....

The City asserts here, as it did in *McCain v. Davis*, ..., ... F. Supp., and as it has asserted again and again in civil rights cases, as if there were no established jurisprudence, that segregation is a proper exercise of the police power to prevent disorder. This notion shows a complete misunderstanding of our federal system and the nature of rights protected under the United States Constitution. Thus, the Supreme Court has said:

> "It is urged that this proposed segregation will promote the public peace by preventing race

> conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Buchanan v. Warley*, 245 U.S. 60, at 81.

That statement was made with regard to a city ordinance segregating Negroes and white persons by residential areas. The Supreme Court repeated the statement in *Cooper v. Aaron*, 1958, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5, a case involving the tense racial feelings generated by the desegregation of Little Rock schools. The Court added: "[L]aw and order are not here to be preserved by depriving the Negro children of their constitutional rights."

Again the Court repeated the quotation from *Buchanan v. Warley*, May 27, 1963, in *Watson v. City of Memphis*, 373 U.S. ....., ... S. Ct. ....., ... L. Ed. 2d ..... There the Court held that the City of Memphis must desegregate its parks and playground without delay: "Constitutional rights are to be promptly vindicated."

The City has a lonely dictum from *Garner v. Louisiana*, 1961, 368 U.S. 157, 82 S. Ct. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 to quote in support of its position. In that case the Supreme Court reversed the convictions of three Negro sit-in demonstrators on the ground that the record was totally devoid of any evidence to support their conviction for a breach of the peace. The Court stated that the Louisiana breach of the peace statute might be construed to "permit the police to prevent an imminent public commotion even though caused by peaceful and orderly conduct." But the case before us is not one in which the plaintiffs are accused of breach of the peace or of causing foreseeable imminent public disorder. The City called

no witnesses to the stand, and the only evidence the City introduced was in the form of two affidavits from public health officials showing the incidence of venereal diseases in white persons and Negroes in the City and State.

In short, it cannot be said that segregation at the Auditorium has any basis in the "clear and present danger" doctrine. The requirement that an audience be segregated at symphony concerts in the Municipal Auditorium is a vestigial remnant from earlier days in our evolution, comparable to the vermiform appendix.

We hold that the Auditorium policy and practice of requiring segregation as part of the City's traditional pattern in public facilities offend both the Equal Protection and Due Process Clauses of the Constitution.

II.

Some time in April 1962 the New Orleans Chapter of the NAACP asked for the use of the Auditorium for the purpose of holding a kick-off meeting of a campaign to increase NAACP membership. The plaintiffs were prepared to pay an additional sum they were told would be needed for extra guards. The City refused the application. A letter of April 16, 1962, gives the following explanation:

> "Please be advised that the Auditorium Advisory Committee has decided unanimously to adhere to the policy adopted several years ago to refuse the use of the building to any person or organization who is known to urge violation of existing laws and customs relating to segregation of the races in this City and State.
>
> "Under the circumstances, you are hereby advised that the application is denied."

There is no evidence before us to indicate that the local

NAACP Chapter or any of its members has ever urged the "violation of existing laws and customs relating to segregation". On the contrary, the immense volume of litigation initiated by the local chapter of the NAACP in this Court attests to its policy of seeking redress in the courts.

On the stand, Mr. Wagner, Manager of the Auditorium, gave a different explanation for rejection of the application. He testified that when a request is made for use of the building for a meeting the policy is to require prospective users to submit the names of their speakers. In this instance the plaintiffs supplied three names of possible speakers: (1) Judge Thurgood Marshall (who had been appointed to the United States Court of Appeals for the Second Circuit and was then serving on the court but had not yet been confirmed); (2) United States Congressman Adam Clayton Powell; and (3) Mr. Robert Weaver, Head of the United States Housing Administration. Apparently, as the letter of April 16 indicates, the City concluded that the character of these speakers or of the local NAACP chapter brought the meeting within the Auditorium's policy of prohibiting the use of the building to any "person or organization who is known to urge violation of existing laws and customs relating to segregation." Neither Mr. Wagner nor Mrs. Boyd, however, was willing to testify to that effect. Mr. Wagner did not remember that two of the possible speakers were Congressman Powell and Housing Administrator Weaver. Mrs. Boyd did not know who Mr. Weaver was. She had heard of Judge Marshall and Congressman Powell.

Counsel for the City, on cross-examination, attempted to show that in March and April 1962 another organization, the Consumers League, had picketed certain businesses and had demonstrated outside of the Orleans Par-

ish Registration Office. The plaintiffs testified that they were not members of the Consumers League and had not participated in any such picketing or demonstration. The record shows no evidence that at the time of the NAACP's application there was unusual tension between the races.

On this evidence we find that, without even the pretense of requiring a showing of a clear and present danger, the City conditioned the use of the Auditorium on the speakers' advocating views compatible with the City's policy of segregation. In a city building intended for public assemblies, Negroes could not obtain the use of the building except by surrendering freedom of speech. The City has no power to make its license to an auditorium-user depend on the licensee's giving up a constitutional right. *Frost & Frost Trucking Co. v. Railroad Commission*, 1926, 271 U.S. 583, 46 S. Ct. 605, 70 L. Ed. 1101; *Hague v. C.I.O.*, 1939, 307 U.S. 495, 59 S. Ct. 954, 83 L. Ed. 1423.

Thus, in *Cantwell v. Connecticut*, 1940, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, the Supreme Court held that an ordinance giving discretionary power to license the right to solicit for a religious cause violated the First Amendment, applicable to the States under the Fourteenth Amendment. The Court said:

> [T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution. 310 U.S. at 307, 60 S. Ct. ....., 84 L. Ed. at 1219.

In *Danskin v. San Diego Unified School District*, 1946,

28 Cal. 2d 536, 171 P. 2d 885, Judge Traynor for the Supreme Court of California said:

> The state is under no duty to make school buildings available for public meetings. * * * If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. * * * Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property. * * * The very purpose of a forum is the interchange of ideas, and that purpose cannot be frustrated by a censorship that would label certain convictions and affiliations suspect, denying the privilege of assembly to those who held them, but granting it to those whose convictions and affiliations happened to be acceptable and in effect amplifying their privilege by making it a special one.

See also *New Orleans v. Hood*, 1947, 212 La. 485, 32 So. 2d 899.

Here the public officials object to licensing persons preaching the equality of man. The Declaration of Independence has something to say about the equality of man. And Congress has made it national policy in numerous statutes. The courts, in countless decisions, have made it a reality in public institutions and governmental facilities. The City's conditional prohibition of free discussion of segregation in an auditorium built, in part, to serve as a public forum, is a plain denial of due process.

The City's action is also a discriminatory practice in violation of the Equal Protection Clause. A municipality cannot deny the use of a public building to one organ-

ization while "permission is freely granted to others [similar organizations] applying [for the use of the building] * * * for the purpose of public assembly and discussion." *Ellis v. Dixon*, 1955, 349 U.S. 458, 75 S. Ct. 850, 99 L. Ed. 1231. Here, the favored organization, similar to the NAACP, is the White Citizens Council.

While turning down the NAACP's request for the Auditorium, the City granted the White Citizens Council an open lease arrangement allowing it to use the Auditorium at any time not in conflict with a previous commitment. The major interest of each of these organizations is in the great national debate over civil rights. As everyone knows, they are on opposite sides of the argument. But each organization uses public meetings to obtain popular support for its point of view and to increase its membership. Each organization is highly controversial.

We take notice of the two organizations through the reported decisions and the litigation in this Court. For sake of argument, we may accept the criterion that the Auditorium should not be licensed to any user likely to cause disorder by increasing racial tensions. By such a criterion, or by any other criterion (based on the evidence before us and such facts of which we may take notice), the lease of the Auditorium to the White Citizens Council and the denial of a lease to the New Orleans Branch of the NAACP was rank discrimination in violation of the Equal Protection Clause of the Constitution.

III.

The role of the City Council is not clear. On the evidence before us, we dismiss the members of the Commission Council of the City of New Orleans as parties defendant, individually and as Councilmen, because the

plaintiffs have made no showing that the Councilmen, individually or collectively, are able under the City's Charter to give the relief sought.

IV.

Here, as in *McCain v. Davis*, 1963, ____ F. Supp. ____, it might be said there is so little substance to the constitutional questions the City raises that a three-judge court should not decide the case. In the interest of expediting justice, however, we adopt the procedure used in *McCain v. David*, 1963, ___ F. Supp. ___; *United States v. Manning*, 1962, W.D. La. 206 F. Supp. 623; and *United States v. Lassiter*, 1962, W.D. La., 203 F. Supp. 20.

Judges AINSWORTH and ELLIS concur in the result.

The defendants' motions are overruled. A prelminary injunction is granted substantially as prayed for in the complaint. A judgment will be drawn accordingly.

(s) JOHN MINOR WISDOM
UNITED STATES CIRCUIT JUDGE

(s) ROBERT A. AINSWORTH, JR.
UNITED STATES DISTRICT JUDGE

(s) FRANK B. ELLIS
UNITED STATES DISTRICT JUDGE

CIVIL ACTION
NO. 12439

HORACE C. BYNUM, ET AL.

VS.

VICTOR H. SCHIRO, ET AL.

FOOTNOTES

1. The Act excludes "religious gatherings, services or functions. LSA-R.S. 4:455

2. In *Dorsey v. State Athletic Commission*, 168 F. Supp. 149, aff'd 349 U.S. 353, 79 S. Ct. 1137, 3 L. Ed. 2d 1028, *reh'g den'd* 360 U.S. 940, 79 S. Ct. 1146, 3 L. Ed. 2d 1552, involving the right of a Negro prize fighter to engage in boxing match with a white prize fighter, this Court held that LSA-R.S. 4:451 was unconstitutional.

3. § *451. Interracial activities involving personal and social contacts prohibited*

All persons, firms and corporations are prohibited from sponsoring, arranging, participating in, or permitting on premises under their control any dancing, social functions, entertainments, athletic training, games, sports or contests and other such activities involving personal and social contacts, in which the participants or contestants are members of the white and negro races.

§ *452. Separate seating and facilities*

At any entertainment or athletic contests, where the public is invited or may attend, the sponsors or those in control of the premises shall provide separate seating arrangements, and separate sanitary, drinking water and any other facilities for members of the white and negro races, and to mark such separate accommodations and facilities with signs printed in bold letters.

§ *453. Races prohibited from using the others seating and facilities*

White persons are prohibited from sitting in or using any part of seating arrangements and sanitary or other facilities set apart from members of the negro race; and members of the negro race are prohibited from sitting in or using any part

of seating arrangements and sanitary or other facilities set apart for white persons.

§ 454. *Penalty*

Any person, firm or corporation violating the provisions of this chapter shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than 60 days nor more than 1 year.

§ 455. *Construction; effective date; religious gatherings exempt*

This Chapter is passed in the exercise of the state police power to regulate public health, morals and to maintain peace and good order in the state and shall be so construed. This Chapter shall not become effective until the fifteenth (15th) day of October, 1956. None of the provisions of this Chapter shall be construed to apply to religious gatherings, services or functions.